95-900

No.

Supreme Court, U.S.
FILED
DEC 4 1995
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MUTUAL TRADING CORPORATION, MOHAMMAD SHAFIQ, and JOHN HAUPER,

Petitioners,

v.

UNIROYAL GOODRICH TIRE CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED

A. Whether disputes arising between two corporations engaged in a long-term, legitimate business relationship, can constitute a "pattern of racketeering activity" in violation of Title 18 U.S.C. §1962.

B. Whether the award of $1.4 million in attorneys' fees to the plaintiff following its recovery of $156,000 in compensatory damages on its combined RICO and state tort claims is a penalty not warranted by Title 18 U.S.C. §1964(c).

C. Whether the plaintiff must elect between recovering treble damages awarded by the court pursuant to 18 U.S.C. §1964(c) and punitive damages awarded by the jury pursuant to common law.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Mutual Trading Corporation, Mohammad Shafiq and John P. Hauper respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on August 3, 1995.

OPINION BELOW

The opinion and judgment of the Seventh Circuit Court of Appeals dated August 3, 1995, is reported at 63 F.3d 516 (7th Cir. 1995). A copy of the opinion is reproduced in the Appendix at page 1A. The judgment of the United States Magistrate for the Northern District of Illinois Eastern Division is reproduced in the Appendix at page 1B.

JURISDICTIONAL STATEMENT

On August 3, 1995, the United States Court of Appeals for the Seventh Circuit entered its judgment and opinion affirming the action of the United States Magistrate Judge for the Northern District of Illinois Eastern Division who tried the case by stipulation of the parties. The petitioners filed a timely request for rehearing which request was denied on September 7, 1995 (Appendix at page 20A).

The jurisdiction of the Court to review the judgment of the United States Court of Appeals for the Seventh Circuit is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Title 18 United States Code Section 1961(5)

Title 18 United States Code Section 1962

Title 18 United States Code Section 1964(c)

These provisions are reproduced, verbatim, in the Appendix commencing at p. 1D.

STATEMENT OF THE CASE

In 1982, a representative of B.F.Goodrich Tire Company[1] approached Shafiq and encouraged him to export Goodrich tires to Saudi Arabia. Shafiq, through his wholly-owned company, Mutual Trading Corporation ("MTC"), quickly became Goodrich's largest Saudi distributor. As a result, Goodrich offered and MTC accepted the opportunity to export the "Detroiter" tire (a first quality, "private label" tire not identified as being manufactured by Goodrich).

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[1] In 1986, B.F.Goodrich Tire Company and Uniroyal Tire Company merged and became the Uniroyal/Goodrich Tire Company.

The benefit of the Detroiter was that MTC would have no competition with other tire distributors in the Saudi marketplace as MTC would be the *exclusive* Detroiter distributor. MTC also continued to sell Goodrich brand name tires in Saudi Arabia in competition with two Saudi Goodrich Tire distributors. Their unhappiness with MTC's success and MTC's desire to have the Detroiter exclusivity agreement memorialized in writing, led the parties to enter into the "Jeddah Agreement."[2]

In late 1986 Shafiq learned of a major quality problem with Detroiter tires. Despite UGTC's assurances that all Detroiter tires were first quality, MTC continued to receive complaints from its customers about second-quality Detroiter tires. In February, 1987 Shafiq discovered U.S. government export reports which revealed that a third party had exported 20,000 second-quality Detroiter tires to Saudi Arabia. Some of these second-quality Detroiter tires were presented to MTC (the official distributor) on warranty claims. MTC requested compensation from UGTC for those warranty losses. MTC's customers refused to place new Detroiter orders until the warranty losses were resolved. UGTC made a series of proposals to adjust MTC's losses but each was substantially less desirable than its standard adjustment policy.

In July, 1988, UGTC finally agreed to compensate MTC but only for Detroiter tires manufactured at its Mexican

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[2] The Jeddah Agreement provided that Goodrich would produce as many Detroiter tires as MTC could sell, that MTC would concentrate its efforts on Detroiter sales and pay an additional 2% for all Goodrich brand name tires which premium would be split between the two Saudi distributors. In exchange for paying this premium, MTC was guaranteed an exclusive requirements contract for the Detroiter tire.

plant between the 13th and 52nd weeks of 1986. MTC was required to identify the tires by their DOT codes and complete a claim form.[3] At the same time, UGTC unilaterally announced that it would no longer produce the Detroiter tire despite the fact that MTC had faithfully paid its 2% premium for UGTC brand name tires pursuant to the Jeddah Agreement.[4] Shafiq complained that MTC's business would be destroyed by the withdrawal of the Detroiter tire. He pleaded with UGTC to continue the line, but to no avail.[5]

Following the appearance of second-quality Detroiter tires in the Saudi market, UGTC's denials that such had occurred, its three-year foot-dragging in compensating MTC for its losses, the elimination of the Detroiter tire, UGTC's implausible explanation for that act and the tire's re-appearance under the guise of a "Medalist" tire, caused

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[3] The U.S. Department of Transportation requires tire manufacturers to emboss certain information (plant location, date of manufacture, etc.) in code on its tires. MTC subsequently filed a claim for 4,896 defective Detroiter tires. The plaintiff partially credited MTC's account for the loss on December 12, 1988 and issued a final credit on November 30, 1989 (more than three years after the problem was first brought to the plaintiff's attention). MTC agreed to retain the defective tires for 90 days during which the plaintiff could inspect them to determine the causes of failure.

[4] It is MTC's belief that either its two Saudi competitors prevailed upon UGTC to squeeze MTC out of the Saudi market or UGTC decided to eliminate MTC. The Saudi market consumed a relatively constant number of tires. Additional suppliers did not create additional demand. As a result, MTC's less expensive Detroiter tires were eating into UGTC's premium brand tire sales.

[5] UGTC ultimately claimed that the tire molds had been left out in the rain and rusted. MTC offered to have the molds resurfaced but that offer was refused, without explanation. Thereafter, a UGTC tire bearing the name "Medalist" was exported by others to Saudi Arabia. The Medalist was *identical* to the Detroiter tire except for the name.

the business relationship between UGTC and MTC to be irretrievably damaged.

Shortly after making its final warranty payment to MTC for the second-quality Detroiter tires, UGTC filed the present lawsuit seeking payment for open accounts and $809,228 in compensatory damages for alleged RICO violations and a variety of purported "frauds" and torts relating to pricing disputes and bonus payments.[6] MTC filed counterclaims complaining of UGTC's breach of the requirements contract (Jeddah Agreement) and UGTC's tortious misconduct.

At the close of the trial, the court entered a directed verdict in the plaintiff's favor on the undisputed open account claims. Thereafter, the jury returned a verdict of $156,000 in compensatory damages in the plaintiff's favor on its *combined* RICO, common law fraud and tort claims. Thereafter, the trial court awarded the plaintiff $1.4 million in attorney's fees and $45,000 in costs.

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[6] The open-account claims (Counts VII and VIII) are claims for breach of contract. It is well accepted that such claims do not constitute a scheme to defraud for purposes of the mail fraud statute, *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (7th Cir. 1990), *United States v. Kreimer*, 609 F.2d 126, 128 (5th Cir. 1980). Consequently, they cannot be deemed predicate acts for RICO.

REASONS FOR GRANTING THE WRIT

A.

THE RULING BELOW THAT COMMERCIAL DISPUTES BETWEEN TWO CORPORATIONS ENGAGED IN A LONG-TERM, LEGITIMATE BUSINESS RELATIONSHIP CAN FORM THE BASIS OF A "PATTERN OF RACKETEERING ACTIVITY" IN VIOLATION OF TITLE 18 U.S.C. §1962 IS CONTRARY TO THE HOLDINGS OF *SEDIMA, S.P.R.L. v. IMREX CO.*, 473 U.S. 479 AND *H.J., INC. v. NORTHWESTERN BELL*, 492 U.S. 229.

This Court held in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1986) that a plaintiff must plead and prove that there is "continuity plus relationship" among the predicate offenses to establish a "pattern of racketeering activity" for purposes of RICO. It further held that isolated predicate acts coupled with the act of conducting an enterprise that affects interstate commerce does not constitute a violation of 18 U.S.C. §1962.

The Court furthered its analysis of "pattern of racketeering activity" in *H.J., Inc. v. Northwestern Bell*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195, 208 (1988) by holding that the predicate acts must both be related *and* amount to, or pose a threat of continuing criminal activity,

> RICO's legislative history tells us . . . that the relatedness of racketeering activities is not alone enough to satisfy §1962's pattern element. To establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity.

Despite the concurring Justices' doubt that short term criminal conduct was intended by Congress to be excluded from the scope of RICO's coverage, the majority concluded that it was.

> Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with *long-term criminal conduct* (emphasis added).

Id., at p. 209.

> [W]hen Congress said predicates must demonstrate "continuity" before they may form a RICO pattern, it expressed an intent that RICO reach activities that amount to or threaten *long-term criminal activity* (emphasis added).

Id., at p. 210, ft.nt. 4.

The Court then provided examples of criminal conduct which would meet the long-term, "continuity" test. The first involved predicate acts which plainly implicate a threat of long-term, continued criminal activity (e.g. a hoodlum extorting monthly "insurance" payments from a shop owner to protect against window breakage). Each such act includes a specific threat extending indefinitely into the future. The second involved predicate acts which either represent the "regular way" of conducting the defendant's *criminal enterprise* or constitute the defendant's regular (but illegal) way of conducting a *legitimate business*, *id.* at p.210. The Court concluded that H.J. Inc.'s allegations that the defendant engaged in a *six-year* pattern of bribing state regulatory officials to receive approvals to charge higher telephone rates adequately pleaded a pattern of racketeering activity.

The facts at bar are not remotely analogous to either the examples of "continuity" provided in *H.J., Inc.* or by the facts of that case. To the contrary, this case reveals a long-term, legitimate business relationship followed by a vitriolic falling out. Much like a divorce, there were charges and countercharges at the time of the breakup. What was *altogether lacking*, however, was any proof of

"long-term criminal conduct" which is RICO's *threshold* requirement.

There was no proof that MTC was either engaged in criminal conduct which projected into the future or that it engaged in criminal conduct as its regular way of doing business with the respondents and its other business partners. It was uncontested that MTC and UGTC had a successful, five-year, on-going business relationship before the predicate acts alleged by UGTC. Moreover, there was no evidence that MTC engaged in "racketeering activity" with its other business partners.

UGTC's pleadings failed to allege and its evidence failed to establish that MTC was either an association existing for long-term criminal purposes or that it committed criminal acts as a regular way of conducting its legitimate business. Simply put, there was no evidence of "continuity." This case presents the archetypical misapplication of RICO. The Court of Appeals for the Seventh Circuit erred in sanctioning UGTC's use of RICO.

B.

THE DISTRICT COURT'S AWARD OF $1.4 MILLION IN ATTORNEYS' FEES TO THE PLAINTIFF FOLLOWING ITS RECOVERY OF $156,000 IN COMPENSATORY DAMAGES ON ITS COMBINED RICO AND STATE TORT CLAIMS CONSTITUTES A PENALTY NOT AUTHORIZED BY TITLE 18 U.S.C. §1964(c).

The plaintiff recovered $156,000 in compensatory damages on its *combined* RICO, common-law fraud and state tort claims.[7] UGTC sought and was awarded $1.4 *million*

[7] It is impossible to know how much the jury awarded to UGTC on its RICO claims due to the format of the special interrogatory

(Footnote continued on following page)

dollars in attorneys fees (for 8500 hours of time churned out by nineteen attorneys, eleven legal assistants and one summer associate) and $45,000 in costs. The petitioners assert that this award constitutes a penalty not contemplated by RICO.

Title 18 U.S.C. §1964(c) contemplates an award of costs and *reasonable* attorney's fees to a successful RICO plaintiff. This Court has held that the "initial estimate" of a reasonable fee is calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate, *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The court may adjust that product taking into account other factors, *Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67, 94 (1989).

Even if the compensatory award were to stand, it was patently unreasonable of the plaintiff to have expended $1.4 million in attorneys' fees to recover less than $156,000 in RICO damages. If there is no requirement that the fees reasonably relate to the nature of the claim and the result obtained, litigants will continue to bludgeon their adversaries with fees as an additional penalty not contemplated by RICO.

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[7] *continued*

(see Appendix C). The petitioners will assume, *arguendo*, that the entire award was for RICO damages. That cannot be the actual case because UGTC was required to prove damages as an element of their fraud and tort causes of action. Hence, the District Court's trebling of the *entire* award pursuant to 18 U.S.C. §1964(c) was plain error.

C.

THE PLAINTIFF MUST ELECT BETWEEN RECOVERING TREBLE DAMAGES AWARDED BY THE COURT PURSUANT TO 18 U.S.C. §1964(c) AND PUNITIVE DAMAGES AWARDED BY THE JURY PURSUANT TO COMMON LAW.

The jury was *not* advised that its compensatory award would be trebled pursuant to 18 U.S.C. §1964(c). The jury awarded $320,000 in punitive damages in favor of UGTC and against the petitioners. Consequently, the plaintiff recovered *quintuple damages*. Such damages are neither contemplated by the RICO Act nor the state law authorizing punitive damages. Each law assumes that its measure of damage will make the plaintiff whole *and* punish the defendant. Neither contemplates successive awards for the *same injury*. UGTC's recovery of five fold its damages was plain error.

CONCLUSION

For the foregoing reasons, the defendants-appellants urge this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review its judgment and opinion.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 94-2915 & 94-3799

UNIROYAL GOODRICH TIRE COMPANY,

Plaintiff-Appellee,

v.

MUTUAL TRADING CORPORATION, MOHAMMAD SHAFIQ and JOHN P. HAUPER,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 2370—**Elaine E. Bucklo**, *Judge.*

ARGUED APRIL 6, 1995—DECIDED AUGUST 3, 1995

Before BAUER, COFFEY, and FLAUM, *Circuit Judges.*

BAUER, *Circuit Judge.* A jury found the defendants (collectively "MTC") liable for civil violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962 *et seq.*, and for violations of various state laws. Uniroyal was also awarded its attorneys' fees and costs incurred in bringing this action. MTC appeals the verdict and the award of fees and costs. It also appeals the trial court's rejection of its counterclaims. Unpersuaded by its arguments, we affirm.

I.

Throughout most of the 1980s, MTC purchased tires from Uniroyal Goodrich ("Uniroyal") and its predecessors and resold them in Saudi Arabia.[1] During the relevant period, Mohammad Shafiq was MTC's president and sole shareholder; John Hauper was MTC's Vice-President. Uniroyal's complaint alleges that MTC bribed a Uniroyal employee in order to induce him into providing MTC with confidential information and into assisting MTC with its plan to defraud Uniroyal. The picture presented by Uniroyal at trial illustrates how this unfolded.

A. The Detroiter Scheme

It became apparent soon after MTC began selling tires in Saudi Arabia that MTC would develop into a significant customer of Goodrich's. Consequently, Goodrich offered MTC the exclusive sale rights to a tire model known as the Detroiter. This opportunity was potentially lucrative because although MTC had two competing Goodrich distributors, it would be alone in selling the Detroiter. To the dismay of its competitors, MTC achieved a significant degree of success with the Detroiter.

In 1986, MTC informed Uniroyal that an entity named Palmer Industries had begun exporting flawed versions of the Detroiter from Mexico into Saudi Arabia. Purchasers of the flawed tires were coming to MTC for refunds, and MTC had paid them. MTC requested that Uniroyal reimburse it.

Uniroyal insisted that MTC substantiate its claim for reimbursement by supplying Uniroyal with a list of the serial numbers for the returned tires. Uniroyal also instructed MTC to hold all the returned tires for Uniroyal's

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[1] In 1986, the Uniroyal Tire Company merged with BF Goodrich's tire business to form the Uniroyal Goodrich Tire Company. We will refer to the premerger entities as UTC and Goodrich respectively, and the postmerger entity as Uniroyal.

inspection. MTC submitted a list of serial numbers for 4,896 tires which matched Uniroyal's records of blemished tires it had sold in Mexico, and so Uniroyal reimbursed MTC. When Uniroyal representatives went to Saudi Arabia to inspect the tires, however, they were told that the majority of the tires already had been discarded. The tires which remained were not on Uniroyal's list of blemished tires or on MTC's list submitted for reimbursement, nor were they marked with the "appearance imperfect" designation as they should have been. Uniroyal subsequently discovered that the information on MTC's reimbursement list had been compiled from information supplied to MTC by Richard Germano, a Uniroyal pricing administrator. After further investigation, Uniroyal concluded that the claim for reimbursement was fraudulent.

B. The Cooperative Advertising Scheme

Germano furthered MTC's position with Uniroyal in other ways. Uniroyal ran a cooperative advertising program under which Uniroyal would bear a portion of its customers' advertising costs. Germano administered this program for Uniroyal's international customers.

In 1988, with Uniroyal's blessing, MTC decided to enter the tire market in Nigeria. Under Nigerian law, MTC had to conduct business through a domestic entity. MTC selected a company called Multiplex Globe as its Nigerian liaison. Multiplex Globe was owned by Shafiq and MTC. MTC submitted requests for cooperative funds for the erection of several billboards and for magazine advertising. Germano approved all of these requests, reimbursing MTC for one hundred percent of its costs despite the fact that the program provided for a maximum reimbursement level of fifty percent. In total, Germano approved reimbursements close to $300,000 for MTC. Upon discovering other fraudulent activity in MTC's account, Uniroyal dispatched its own internal auditor, Martin Wynne-Brown and a subordinate, Tom Taylor, to Nigeria to inspect the billboards. Their investigation uncovered some unsettling truths. First, they obtained estimates from two advertising agencies in Lagos,

Nigeria, which placed the cost of the work done at approximately $25,000. Second, they learned that the billboards they had seen had only recently been erected. This was about two years after the reimbursements had been requested.

Meanwhile, back at the Uniroyal ranch, the company's investigation was closing in on Germano. On February 29, 1990, Germano confessed to being "lenient" on MTC's advertising account. He also told company auditors that about the time he was handling the cooperative advertising payments for MTC, he had met with Hauper, MTC's Vice-President. Hauper gave Germano a plane ticket to London where Germano met Patrick Mehl, an MTC representative. Mehl gave Germano $15,000 which Germano deposited in a Gibraltar bank account. Ten months later, Germano received another $5,000 from MTC. (The two payments remained unreported in Germano's tax returns until he was deposed in this case at which time he filed an amended return reflecting the payments.)

C. The Volume Bonus Scheme

Yet another instance of fraud arose from some creative bookkeeping with respect to MTC's account. Uniroyal had an incentive program which rewarded customers annually for high volume purchases. To be included in any given year's calculation, tires had to have been shipped and paid for. In December of 1987, Germano included in MTC's account an order for 50,000 tires which had not yet been manufactured let alone purchased and delivered. Moreover, Germano did not deduct those orders from the 1988 purchase tally. In fact, Germano added 80,000 tires to MTC's account which never existed. The result of Germano's shenanigans was an unearned credit to MTC's account exceeding $230,000.

D. Other Schemes

Another scam involving Germano and MTC occurred after Germano agreed to help unload the excess inventory

of a discontinued model known as the Reno tire. Germano shipped some of these to MTC but billed MTC for a cheaper type of tire, a model known as the ADV tire. Germano claimed MTC told him that the tires were ADV tires and not Reno tires. But testimony from those who saw the tires revealed that the tires were in fact the more expensive Reno tires.

In addition to these more elaborate schemes, Germano engaged in several isolated but no less serious actions most of which involved some creative bookmaking but all of which bestowed upon MTC a healthy windfall at the expense of his employer. He often charged MTC prices well below those authorized by Uniroyal and on one occasion, in direct defiance of his superior's directions, wrote off interest charges in excess of $38,000.

Subsequent to his confession to Uniroyal's auditors, Germano resigned, and Uniroyal severed its relationship with MTC. Uniroyal then filed a twelve-count complaint consisting of five civil RICO counts[2] and seven pendent state law counts. The defendants filed a five-count counterclaim, which alleged, among other things, that Uniroyal violated its contract by halting production of the Detroiter and by selling tires that were not as warranted.

The trial court granted Uniroyal summary judgment on some of MTC's counterclaims, and on the remainder, the trial court entered judgment as a matter of law in Uniroyal's favor at the close of the evidence. The jury then returned a verdict in Uniroyal's favor on the RICO counts and the state law claims. In total, Uniroyal was awarded approximately $2.8 million in damages. The court then assessed fees and costs against MTC in the amount of $1.4 million.

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[2] Though the complaint contains five RICO counts, the pattern of racketeering activity alleged in each count is the same.

II.

On appeal, MTC attacks the jury verdict from several angles. It also challenges the trial court's decision on its counterclaims and on fees and costs. We consider each in turn.

We begin with the state law claims because they also form the predicate of the civil RICO counts. MTC appeals the verdict on three counts of the complaint: intentional interference with contractual relations, violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2, and common-law fraud. We review the evidence in a light most favorable to Uniroyal, to determine whether a rational trier of fact could have concluded that the evidence supported a finding of liability on each count. *United States v. Mokol*, 957 F.2d 1410, 1414-15 (7th Cir.), *cert. denied*, 113 S. Ct. 284 (1992). The standard of review is significant here because MTC ignores it in making its arguments. The flaw in MTC's sufficiency of the evidence claims is that each rests on a skewed view of the evidence that is far from favorable to Uniroyal.

For instance, Uniroyal's interference with contractual relations claim was based on MTC's bribing of Germano. MTC contends that the payments made to Germano were for unrelated consulting work, and therefore did not precipitate a breach by Germano. But that is not all that the jury heard. The jury heard that the payments were handled in a very secretive fashion, and that Germano concealed the existence of those payments from his wife, his employer, and from the Internal Revenue Service. The jury also heard that Germano had admitted to being "lenient" on MTC's advertising account. In light of this, the jury was justified in concluding that the payments had a more sinister purpose and that the consulting story was a hoax. Given the timing of the payments and Germano's actions which repeatedly improved MTC's position at Uniroyal's expense, it was reasonable to infer that MTC paid Germano to assist MTC in its various schemes to defraud Germano's employer.

In support of its statutory and common-law fraud claims, Uniroyal cited the Detroiter tire scheme, the cooperative advertising scheme, the Reno tire scheme, and the volume bonus scheme. The jury concluded that the evidence supported the allegations and found for Uniroyal on both counts. MTC contests the verdict, claiming that the evidence fails to show that MTC or its agents made a false statement of material fact.

MTC claims that the evidence of the Detroiter scheme consisted solely of testimony by Uniroyal representatives stating that they did not see all the returned flawed tires upon their visit to Saudi Arabia. MTC tried to show that the reason they could not see those tires was because the tires were stored away from MTC headquarters. This evidence alone, according to MTC, cannot sustain a finding of fraud.

MTC's claim again fails to account for all of the evidence. William Davies, one of the men dispatched to Saudi Arabia to verify MTC's claims pertaining to the blemished tires, testified that, despite Uniroyal's request to hold the tires for inspection, MTC had already discarded them. He also testified that the tires which were present were not designated as blemished or imperfect as they would have been had MTC's claim been authentic. Moreover, MTC's argument does not explain away evidence establishing that MTC obtained from Germano confidential Uniroyal information which facilitated MTC's attempt to claim credits for tires that were never returned to it. When all this is topped off with evidence of the clandestine payments made to Germano by MTC, the jury's finding of fraud is understandable.

MTC's portrayal of the evidence offered as proof of the other schemes is similarly one-sided and ultimately unpersuasive. MTC contends that the evidence offered to prove the Reno tire scheme was inadequate because Uniroyal did not show that Germano deliberately billed MTC for cheaper tires. Again, MTC simply argues in favor of one inference over another permissible inference. Germano admitted to rebilling MTC at the lower ADV prices without

getting any confirmation on whether the tires were in fact ADV tires. It was up to the jury to determine the credibility of his testimony and to determine whether the adjustment was innocent or part of the concocted fraud. In light of evidence that Germano had made severe adjustments on prices and interest charged to MTC, sometimes in direct contravention of his superior's orders, the jury's conclusion was reasonable.

MTC attacks the evidence presented in support of the cooperative advertising scheme in a slightly different way. Uniroyal's evidence established two separate things with respect to this scheme. First, there was evidence that MTC's stated advertising costs (approximately $300,000) far exceeded the going rates in Nigeria for similar work (approximately $25,000), and that Germano was reimbursing at a rate of one hundred percent of MTC's costs rather than the customary fifty percent. Second, Uniroyal provided testimony indicating MTC never actually posted the billboards for which it received funds until Uniroyal began its investigation. MTC claims that the evidence admitted in proving the market rate for advertising was inadmissible hearsay and that without this, the remaining evidence would have been insufficient. Since we believe the evidence on market rates was admissible, we decline MTC's invitation to reverse.

As part of its proof establishing that MTC was bilking Uniroyal, Uniroyal offered the testimonies of Martin Wynne-Brown and Olutora Senbore. Wynne-Brown was responsible for Uniroyal's internal auditing program and uncovered the scam involving Germano and MTC's fraudulent advertising claims. Senbore was an accountant in the Nigerian office of the accounting firm, Coopers and Lybrand, and was hired to investigate and report on MTC's Nigerian advertising operations. In their testimonies, Wynne-Brown and Senbore stated that MTC had requested and received reimbursement for amounts far in excess of what was typical in Nigeria for billboard advertising. Accompanying the testimony were two exhibits each containing estimates from two different advertising agencies lo-

cated in Lagos, Nigeria. The first exhibit contained advertising prices from Insight Communications estimating that for similar work, Insight would have charged about $25,000 rather than the near $300,000 charged by Multiplex Globe and MTC. The second exhibit was a list of outdoor advertising rates charged by a company known as Adspace. Adspace's list indicated that for similar work, it would have charged between $10,000 and $20,000.

MTC maintains that the testimony and the exhibits should have been excluded as hearsay. MTC's argument is that the quotes given by the two advertising agencies were out-of-court statements admitted for the truth of what was contained in them and that without those quotes, Wynne-Brown and Senbore could not testify on those prices because they did not know whether they were in fact true.

We believe that a proper foundation was laid for both exhibits establishing that the estimates were compiled in the regular course of business. And as the trial court noted, there is nothing to suggest that they lack trustworthiness. They were therefore properly admitted. Fed. R. Evid. 803(6). Moreover, the Insight and Adspace exhibits provide a reasonable basis for Senbore's and Wynne-Brown's testimony on market advertising rates in Nigeria, and therefore we believe the hearsay objections to their testimony were also properly rejected.

As an aside, we note that even without evidence of the market rates, the jury had a sufficient basis to find fraud in how MTC's advertising costs were reimbursed. In addition to the evidence indicating that the billboards were not up until Uniroyal began its investigation, there was unrefuted evidence that Germano was reimbursing MTC at twice the permitted rate. Even from this evidence, the jury could have concluded that MTC was swindling Uniroyal on the advertising.

We proceed next to consider MTC's challenge to the finding of RICO liability. Section 1964 of RICO imposes civil liability on those found liable for deriving money

through a "pattern of racketeering activity." The remedies available to a successful plaintiff are plentiful: they include provisions for treble damages, costs, and attorneys' fees. 18 U.S.C. § 1964(c). The murkiness of RICO's parameters coupled with its alluring remedies have led many plaintiffs to take garden variety business disputes and dress them up as elaborate racketeering schemes.

At issue in this case is whether this dispute truly presents a pattern of racketeering. The vagaries of the statute itself make the task of defining this requirement formidable, to say the least. In two decisions, the Supreme Court has ruled out interpretations at either extreme. In its decision in *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the Court noted that the requirement of two or more predicate acts was a necessary but not sufficient condition to a finding of a pattern. *Id.* at 496 n.14. In so doing, the Court implicitly repudiated the interpretation in some circuits which simply equated a finding of two or more predicate acts with a pattern. Instead, the Court reasoned that in order to establish a pattern, a plaintiff must show a relationship between the predicate acts and the threat of continued criminal activity. *Id.*

A few years later in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 230 (1989), the Court rejected the Eighth Circuit's construction of the pattern requirement. Under the rejected interpretation, a single ongoing scheme to defraud could not sustain a RICO finding; a plaintiff had to show at least two separate fraudulent schemes to prevail. After looking at the statute's legislative history, the Court concluded that Congress' preoccupation in enacting RICO was to curb the incidence of long-term criminal conduct. *Id.* at 240. In light of this purpose, the Eighth Circuit's requirement was counterproductive because it is not a necessary precondition to prolonged criminal activity that the perpetrators defraud their victims in more ways than one. The Court held, therefore, that a single scheme could support a finding of RICO liability. *Id.* at 241. The Court's outright rejection of bright-line tests in *Sedima* and *H.J. Inc.* ensured that the outcome of each particular case would rest on a fact-intensive analysis.

In conclusory fashion, the defendants argue that the trial court erred in failing to grant their motion for judgment as a matter of law, despite the jury's verdict. They claim that the evidence failed to establish anything more than an isolated and short-lived instance of fraud in an otherwise successful business relationship.

MTC's attempt to depict this as one single fraud is understandable. Our RICO jurisprudence is replete with examples of failed attempts to dress up state fraud claims as suave RICO cases using the expansive definitions of mail and wire fraud. In *Lipin Enters. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986), the plaintiffs alleged that a fraudulent acquisition of stock amounted to a RICO violation because it entailed a multitude of fraudulent statements and representations transmitted through the mails and wires. We rejected that assertion, holding that just because the complexity of the transaction creates the potential for a greater number of possible fraudulent acts does not mean that there is the requisite threat of continued criminal activity. *Id.* "[M]ultiple acts of mail fraud in furtherance of a single episode of fraud involving one victim and relating to one basic transaction cannot constitute the necessary pattern." *Jones v. Lampe*, 845 F.2d 755, 757 (7th Cir. 1988) (quoting *Tellis v. U.S. Fid. & Guar. Co.*, 826 F.2d 477, 478 (7th Cir. 1986)).

In *Olive Can Co. Inc. v. Martin*, 906 F.2d 1147, 1150 (7th Cir. 1990), the defendants set up a sham corporation in an attempt to divert money from their own failing cookie manufacturing business and then concealed its existence from the plaintiffs who sold them supplies on credit. The district court had found that the scam was not continuous within the meaning of RICO because it was done to pay off one of the defendants' personal obligations. *Id.* at 1151. Hence, the fraudulent scheme had a natural ending with no threat of ongoing criminal activity. We agreed and affirmed the finding of no liability. *Id.* at 1152.

Lee and *Olive Can* notwithstanding, the existence of a single victim does not preclude the existence of a pattern of racketeering activity. In *Liquid Air Corp. v. Rogers*,

834 F.2d 1297, 1300 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989), the plaintiff, Liquid Air, had leased compressed gas cylinders to the defendant, D & R. After D & R terminated operations, it was slow to return the rented equipment. *Id.* When Liquid Air began charging D & R a higher rate for the remaining 3,000 cylinders, D & R obtained the services of a Liquid Air employee, who, over the course of seven months, generated nineteen separate false invoices making it appear as if the cylinders were being returned. *Id.* We were consequently faced with deciding whether a single scheme which lasted seven months and defrauded one victim established a pattern of racketeering activity. We held that it did. Crucial to our conclusion was the fact that each instance of false billing inflicted an injury separate and independent of the previous and succeeding instances of false billing. "[T]he repeated infliction of economic injury upon a single victim of a single scheme is sufficient to establish a pattern of racketeering activity for purposes of civil RICO." *Id.* at 1305.

In this circuit, we have looked to several factors in ascertaining the existence of a pattern: the number and variety of predicate acts, the length of time over which they were committed, the number of victims, the presence of separate schemes, and the occurrence of distinct injuries. *Olive Can*, 906 F.2d at 1151. Neither the presence or absence of any one of these factors is determinative, and though these factors may be helpful, the touchstones of the inquiry remain the elements of relationship and continuity. Of these factors, all but one weigh in Uniroyal's favor. The predicate acts were numerous and spread out over a period of years. Uniroyal offered proof of several different schemes, all intended to bleed money from Uniroyal. And each scheme caused a harm distinct from that caused by the others. Only the existence of a single victim, Uniroyal, favors MTC. By itself, that is not enough.

The distinctions between *Liquid Air* and *Lee* and *Liquid Air* and *Olive Can* command the outcome in this case. The potential expansiveness of RICO stems largely from the capacious definitions of mail and wire fraud. It is

therefore hard to formulate a bright-line test for the pattern of racketeering activity based solely on the number of predicate acts. But from these three single-victim cases, we begin to see what distinguishes a pattern. In *Lee* and *Olive Can*, there was an interdependence amongst the predicate acts, and each act was not responsible for a discrete injury. The various fraudulent representations made in *Lee* did not inflict separate harms; rather they were all necessary to perpetrate one large fraud. Similarly, the predicate acts in *Olive Can* were all related to the perpetration of one scam which would have ended on its own. On the other hand, in *Liquid Air*, each false invoice on its own deprived the plaintiffs of a specific amount of revenue. Each invoice represented a discrete attempt to defraud Liquid Air and had little to do with the previous or subsequent false invoices.

If this case is in any way distinguishable from *Liquid Air*, it is that it presents a stronger case for liability; the facts of this case put it squarely within RICO's ambit. Taken in a light most favorable to Uniroyal, proven at trial were the existence of at least four separate schemes all of which were designed to swindle money from Uniroyal and all of which utilized the mails and wires to further their ends. The existence of several schemes strengthens the support for the jury's verdict and satisfies the dictates in *Sedima* and *H.J. Inc.* The various predicates of mail and wire fraud occurred repeatedly over a period as long as three years and each scheme, though inflicted upon the same victim, caused separate and distinct injuries like those caused in *Liquid Air*.

We turn our attention to MTC's arguments pertaining to its counterclaims. MTC argues that all of its counterclaims were improperly rejected. After reviewing its arguments, we believe that only the decisions with respect to two counterclaims merit discussion. In the first counterclaim, MTC alleged that Uniroyal fraudulently misrepresented that its tires were of U.S. origin. The second counterclaim charged Uniroyal with breach of contract, and breach of the duties of good faith and fair dealing

for discontinuing shipment of the Detroiter tire. MTC contends that it was error for the court not to allow these claims to go to a jury.

MTC's arguments fail to undermine the reasoned opinions of the district court. MTC received model XLM tires that were manufactured in Canada and the United States. Some of the invoices warranted that the tires were of U.S. origin while others claimed U.S./Canada as their origin. Although MTC claimed that tires manufactured in Canada were warranted as being of U.S. origin, the district court found, and MTC conceded, that MTC could not show that the Canadian tires were invoiced as U.S. origin tires. In this respect, MTC's claim of fraud was speculative, and the district court, therefore, had little choice but to enter judgment as a matter of law in Uniroyal's favor. On appeal, MTC fails to point to evidence which might rebut the district court's conclusion.

As to the second claim, in the fall of 1987, Uniroyal ceased production of the Detroiter. MTC alleged that this caused MTC to suffer serious losses in the Saudi Arabian market. Yet, the hurdle which MTC failed to clear at trial remains uncleared and that is the issue of damages. Hauper estimated that MTC would have sold 10,000 tires per month for the remainder of 1987, 15,000 tires per month in 1988, and between 18,000 and 20,000 tires per month in 1989. MTC calculated its damages by multiplying these numbers by the average markup on the Detroiter tire. The problem is that none of Hauper's estimates had support. MTC did not submit into evidence any commitments or orders that supported the projections. Nor were they based on historical numbers. In fact, MTC had never averaged even close to selling 10,000 tires per month in the four years it had sold the Detroiter. Moreover, there was evidence that MTC's sale of other tires increased after production of the Detroiter was suspended, yet MTC neglected to account for the mitigation in its alleged damages. Given the lack of support for damages, the trial court was understandably reluctant to let the matter go to the jury. For all of the foregoing, we affirm the trial court's decision granting Uniroyal judgment as a matter of law.

Finally, we review the trial court's decision to award Uniroyal its fees and costs. Uniroyal's request for fees was predicated on Rule 54(d)(2) of the Federal Rules of Civil Procedure, 18 U.S.C. § 1964(c), 815 ILCS 505/10a(c), and Mohammad Shafiq's personal guaranty.[3] Because the trial court is far better situated to determine what costs and fees are reasonable, we will reverse its decision only upon finding an abuse of discretion. *FMC Corp. v. Varonos*, 892 F.2d 1308, 1315 (7th Cir. 1990).

As an initial matter, we believe that Uniroyal's entitlement to attorneys' fees cannot be disputed. Both RICO and the Illinois Consumer Fraud and Deceptive Business Practices Act expressly allow such an award, and where as is the case here, a plaintiff is entitled to fees arising from one claim, that plaintiff may also obtain fees for other successful claims arising from the same common nucleus of facts. *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Moreover, in addition to the statutory provisions authorizing an award of fees, Shafiq's personal guaranty undoubtedly also contemplates attorneys' fees. *See Boulevard Bank Nat'l Ass'n v. Philips Medical Sys. Int'l B.V.*, 15 F.3d 1419, 1426 (7th Cir. 1994) (guaranty's provision for "collection costs" included attorneys' fees). We therefore focus our inquiry on whether the amount awarded was reasonable.

MTC first takes issue with the number of attorneys who appeared on Uniroyal's behalf for pretrial court appear-

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[3] As part of MTC's arrangement with Uniroyal, Shafiq agreed to personally guarantee obligations owed by MTC to Uniroyal. The relevant portion of Shafiq's guaranty reads:

> The undersigned [Shafiq] does, absolutely and unconditionally, GUARANTEE, the punctual payment at maturity to you [Uniroyal] of each and all of the Obligations, together with interest thereon and any and all expenses which may be incurred by you in collecting all or any of the Obligations and/or in enforcing any rights hereunder; and it is specifically agreed that the liability of the undersigned hereunder shall be UNLIMITED in amount.

ances and depositions. Specifically, MTC claims that Uniroyal should not be reimbursed for more than one attorney's time per court appearance or deposition. The trial court rejected this contention on the ground that it was not unreasonable for more than one attorney to attend certain pretrial motions in a complex litigation which spanned over four years and entailed substantial discovery. We agree with the court's assessment. In a case of this size, it would have been sensible for the attorneys to divide up the responsibilities of the pretrial litigation thereby necessitating that each attorney be present for court appearances. MTC fails to demonstrate otherwise, and therefore, we find the trial court's decision was eminently reasonable and well within its discretion.

MTC's next challenge to the award of attorneys' fees contends that Uniroyal overstaffed this case by dispatching two attorneys and a legal assistant to handle the trial full-time along with a third attorney who was in attendance part-time. Judge Bucklo found this to be a reasonable use of resources considering that the trial spanned a four-week frame and involved over 1,300 exhibits. Again, we find this determination perfectly reasonable. MTC claims that the length of the trial and the number of exhibits are misleading because this trial was straightforward and that the only reason the case could be considered complex was because Uniroyal "struggled to transform simple tort claims into RICO claims." Yet, an ever-increasing number of authorities including the jury, the trial court, and now this court, believe that Uniroyal presented a very persuasive RICO case. The complexity of the case justified the efforts of the team of lawyers.

Next, MTC claims that the trial court erred in failing to deduct from the award of fees, time spent on "failed and useless activities." Closer examination reveals that MTC wishes to exclude fees incurred for any work performed by Uniroyal's attorneys on motions which were eventually denied. MTC does not provide us with authority in support of this proposition, nor does our own review uncover any. Common sense, however, informs us that such a rule is inappropriate. There is a significant

difference between frivolous claims and colorable but unsuccessful claims. Were we to deem unreasonable the reimbursement of fees incurred for the latter, we would be discouraging the type of representation attorneys are duty-bound to provide. So as long as statutes allow prevailing parties to recover attorneys' fees "reasonable" in amount, we are not prepared to link our definition of "reasonable" to whether the fees are incurred in pursuit of a successful task.

Before we turn our attention to the award of costs, we consider MTC's request that the costs of computerized legal research be subtracted from the award. MTC claims that these expenses are better characterized as overhead in the same way that maintenance of a law firm library is. We reject this claim. In *Haroco v. American Nat'l Bank & Trust*, 38 F. 3d 1429, 1440-41 (7th Cir. 1994), after noting the similarities between computerized research and traditional manual research, we concluded that there was no reason to consider one type of research reimbursable as attorneys' fees and not the other. They are in their aims indistinguishable. We therefore affirm the trial court's inclusion in its award of attorneys' fees the costs of computerized research.

MTC also contests the award of reimbursement for the expenses Uniroyal incurred in obtaining the testimony of its experts and expenses incurred in copying documents. We can dispose of each of these claims succinctly. RICO authorizes the trial court to award a successful plaintiff "the cost of the suit." 18 U.S.C. § 1964(c). Before the trial court, MTC argued that Uniroyal had not adequately apportioned its expert witness fees to account for the claims in which the experts' testimonies were helpful and those claims in which it was not. Terming this argument "baseless," Judge Bucklo held that because the testimonies of Uniroyal's two experts were "reasonably necessary for Uniroyal to prove its case," their expenses were reimbursable. MTC argues for the first time on appeal that expert witness fees are not recoverable. Even if we were to ignore MTC's forfeiture of this claim, we would still

reject it. In reaching its conclusion, the trial court relied on civil rights cases in which provisions which allow the award of a "reasonable attorney's fee" are construed to include the costs of expert witnesses. *See, e.g., Heiar v. Crawford County, Wisconsin*, 746 F.2d 1190, 1203 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985). Because we believe this analogy to be sound, we affirm the trial court's conclusion.

As for the award of Uniroyal's copying costs, the documents at issue were Uniroyal documents requested by MTC, some of which were eventually introduced by MTC at trial. MTC claims that rather than copying the requested documents and giving the copies to MTC, Uniroyal should have tendered the originals to MTC and allowed MTC to copy them. As the trial court noted in rejecting this claim, the irrelevance of who did the photocopying is striking. MTC claims it could have saved money by copying only those documents it needed. But Uniroyal's reluctance to give out originals of important corporate documents is defensible. MTC also quibbles with the costs of duplicating and enlarging certain of Uniroyal's exhibits for the purpose of demonstration at trial. This claim is meritless, and again we defer to the trial court's determination that these demonstrative aids were helpful to the jury's understanding of the case.

III.

The trial court's decisions entering judgment on the verdict, rejecting MTC's counterclaims, and awarding Uniroyal its fees and costs are in all respects

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: August 3, 1995

BEFORE:

Honorable WILLIAM J. BAUER, Circuit Judge
Honorable JOHN L. COFFEY, Circuit Judge
Honorable JOEL M. FLAUM, Circuit Judge

Nos. 94-2915 & 94-3799

UNIROYAL GOODRICH TIRE COMPANY,

Plaintiff-Appellee

v.

MUTUAL TRADING CORPORATION,
MOHAMMAD SHAFIQ and JOHN P. HAUPER,

Defendants-Appellants

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 90 C 2370, Elaine E. Bucklo, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 7, 1995.

Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

UNIROYAL GOODRICH TIRE COMPANY,

Plaintiff-Appellee,

Nos. 94-2915, 94-3799 v.

MUTUAL TRADING CORP., et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
90 C 2370—Elaine E. Bucklo, *Magistrate Judge*.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-captioned case by the defendants-appellants, all of the judges on the original panel have voted to deny and none of the judges in active service has requested a vote thereon.

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE

[Case Number: 90 C 2370]

Uniroyal Goodrich Tire Co.
v.
Mutual Trading Corp.
Mohammad Shafiq, John Hauper and
Richard K. Germano.

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment as a matter of law is entered in favor of Uniroyal Goodrich Tire Co. and against defendants Mutual Trading and Mohammad Shafiq in the amount of $1,794,375.00 on all non-Reno tire claims in counts VII and VIII.

Judgment on the jury verdict is entered as follows: With respect to plaintiff's claim under section 1962 (c) of RICO, judgment is entered in favor of the plaintiff and against defendants Mohammed Shafiq and John Hauper under Section 1962 (a) of RICO, against defendants Shafiq, Hauper and Mutual Trading Corp.; under Section 1962 (d) of RICO, against all defendants; under Section 1962 (b) of RICO, against defendants Shafiq, Hauper and Mutual Trading Corp.

With respect to plaintiff's claim under the Illinois Consumer Fraud Act, judgment is entered in favor of plaintiff and against defendants Shafiq and Hauper. With respect to plaintiff's claim for payment on debt on account of goods sold and delivered, judgment is entered in favor of plaintiff and against defendant Mutual Trading Corp. in the amount of $220,000.00. With respect to plaintiff's claim under personal guaranty, judgment is entered in favor of the plaintiff and against defendant Shafiq in the amount of $220,000.00. With respect to plaintiff's claim for fraud, judgment is entered in favor of plaintiff and against all defendants. With respect to the claim for breach of fiduciary duty, judgment is entered in favor of plaintiff and against defendant Richard Germano. With respect to plaintiff's claim for intentional interference with contractual relations, judgment is entered in favor of plaintiff and against defendants Shafiq, Hauper and Mutual Trading Corp. With respect to damages, judgment is entered in favor of the plaintiff in the amount of $156,000.00. Pursuant to 18 USC Section 1964 (c), this amount awarded on the RICO claim is trebled to $468,000.00. With respect to the claim for fraud or interference with contractual relations, judgment for punitive damages is entered in favor of the plaintiff and against defendant Richard Germano in the amount of $20,000.00; against defendant Mohammed Shafiq in the amount of $250,000.00; and against defendant John Hauper in the amount of $50,000.00.

Date May 27, 1994 Clerk

APPENDIX C

[Filed May 27, 1994]

VERDICT FORM

(1) With respect to plaintiff Uniroyal Goodrich Tire Company's claim under Section 1962(c) of RICO, we the jury find

(a) in favor of Uniroyal Goodrich and against defendants

Mohammad Shafiq X
John Hauper X

(check any defendant against whom you find liability)

(b) in favor of all defendants ____.

(2) With respect to plaintiff Uniroyal Goodrich Tire Company's claim under Section 1962(a) of RICO, we the jury find

(a) in favor of Uniroyal Goodrich and against defendants

Mohammad Shafiq X
John Hauper X
Mutual Trading Corp. X

(b) in favor of all defendants ____.

(3) With respect to plaintiff Uniroyal Goodrich Tire Company's claim under Section 1962(d) of RICO, we the jury find

(a) in favor of Uniroyal Goodrich and against defendants

Richard Germano X
Mohammad Shafiq X
John Hauper X
Mutual Trading Corp. X

(b) in favor of all defendants ____.

(4) With respect to plaintiff Uniroyal Goodrich Tire Company's claim under Section 1962(b) of RICO, we the jury find

(a) in favor of Uniroyal Goodrich and against defendants

Mohammad Shafiq ___X___
John Hauper ___X___
Mutual Trading Corp. ___X___

(b) in favor of all defendants ____.

(5) With respect to plaintiff Uniroyal Goodrich Tire Company's claim under the Illinois Consumer Fraud Act, we the jury find

(a) in favor of Uniroyal Goodrich and against defendants

Richard Germano ____
Mohammad Shafiq ___X___
John Hauper ___X___

(b) in favor of all defendants ____.

(6) With respect to plaintiff Uniroyal Goodrich Tire Company's claim for payment of debt on account of goods sold and delivered, we the jury find

(a) in favor of Uniroyal Goodrich and against defendant Mutual Trading Corp. ___X___

(b) in favor of defendant Mutual Trading Corp. ____.

(c) We find the amount of that debt, if any, to be $220,000.00.

(7) With respect to plaintiff Uniroyal Goodrich Tire Company's claim under personal guaranty, we the jury find

(a) in favor of Uniroyal Goodrich and against defendant Mohammad Shafiq ___X___

(b) in favor of defendant Mohammad Shafiq ____

(c) we find the amount of that debt, if any to be $220,000.00.

(8) With respect to plaintiff Uniroyal Goodrich Tire Company's claim for fraud, we the jury find

(a) in favor of Uniroyal Goodrich and against defendants

Richard Germano	X
Mohammad Shafiq	X
John Hauper	X
Mutual Trading Corp.	X

(b) in favor of all defendants ____.

(9) With respect to plaintiff Uniroyal Goodrich Tire Company's claim for breach of fiduciary duty, we the jury find

(a) in favor of Uniroyal Goodrich and against defendant Richard Germano X

(b) in favor of defendant Richard Germano ____.

(c) (If you found in favor of Uniroyal Goodrich), we assess damages in the amount of $ -0- .

(10) With respect to plaintiff Uniroyal Goodrich Tire Company's claim for intentional interference with contractual relations, we the jury find

(a) in favor of Uniroyal Goodrich and against defendants

Mohammad Shafiq	X
John Hauper	X
Mutual Trading Corp.	X

(b) in favor of all defendants ____.

(11) If you decide claims 1-5, 8 and 10 or any of them in favor of plaintiff Uniroyal Goodrich Tire Company, what sum in damages do you award? $156,000.00.

(12) With respect to plaintiff Uniroyal Goodrich Tire Company's claims for fraud or interference with contractual relations, do you find that punitive damages should be awarded?

Yes	X
No	____.

If you decided that punitive damages should be awarded, what sum, if any, do you award against

Richard Germano	$20,000.00
Mohammad Shafiq	$250,000.00
John Hauper	$50,000.00
Mutual Trading Corp.	$ -0- .

[Signatures of Jurors Omitted in Printing]

APPENDIX D

§ 1961. Definitions

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is

engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district

court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Supreme Court, U.S.
FILED
JAN 5 1996
CLERK

No. 95-900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MUTUAL TRADING CORPORATION, MOHAMMAD SHAFIQ, and JOHN HAUPER,

Petitioners,

v.

UNIROYAL GOODRICH TIRE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A. Whether the existence of at least four separate schemes, all of which were designed to swindle money from the victim over a three-year period, can constitute a "pattern of racketeering activity" in violation of Title 18 U.S.C. § 1962.

B. Whether the district court's award of $1.4 million in attorneys' fees to the plaintiff following a combined verdict of $2.8 million was reasonable and not a "penalty".

C. Whether the district court's trebling of damages pursuant to Title 18 U.S.C. § 1964(c) and the jury's award of punitive damages on state tort claims were correct and whether the issue was properly raised in the petition.

RULE 29.6 LISTING

Uniroyal Goodrich Tire Company ("Uniroyal Goodrich") is now merged into Michelin North America, Inc. ("Michelin"). The parent company of Michelin is Michelin Corporation. Uniroyal Goodrich presently exists as a business unit of Michelin known as Uniroyal Goodrich Tire Manufacturing. Accordingly, Uniroyal Goodrich does not have any subsidiaries.

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No. 95-900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MUTUAL TRADING CORPORATION, MOHAMMAD SHAFIQ, and JOHN HAUPER,

Petitioners,

v.

UNIROYAL GOODRICH TIRE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

Respondent, Uniroyal Goodrich Tire Company ("Uniroyal Goodrich"), respectfully requests that this Court deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 63 F.3d 516 (CA7

1995) ("the Opinion"). A copy of that Opinion is reproduced in petitioners' Appendix beginning on page 1A.[1]

Petitioners' Appendix does not include the district court's memorandum opinion awarding attorneys' fees and costs. The district court's memorandum opinion is reproduced in respondent's Appendix beginning on page A1.

STATUTORY PROVISIONS INVOLVED

In addition to the statutes set out in the petition, this case also involves the attorneys' fee provision of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/10a, which is reproduced in respondent's Appendix at page B1.

STATEMENT OF THE CASE

Introduction

Petitioners' Statement of the Case omits nearly all of the material facts this Court needs in order to decide whether the petition should be granted. Incredibly, neither petitioners' Statement of the Case nor their argument mentions the names of two primary defendants, or discusses their involvement in the fraudulent schemes which formed the basis of the case below. Petitioners' recitation of the underlying facts is so misleading as to be nearly unrecognizable from the case which was decided at trial and affirmed by the Seventh Circuit. Even a cursory comparison of the Seventh Circuit's opinion

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[1] The Opinion below will be cited as "Opinion, Pet. __."

with petitioners' Statement of the Case reveals an egregious misstatement of the case.

In their Statement of the Case, petitioners discussed only matters involving their counterclaims.[2] In fact, not one of the "Questions Presented" makes any reference to petitioners' counterclaims. Pet. at 2-5. Thus, petitioners' Statement of the Case is wholly irrelevant to the issues raised in the petition. In violation of Supreme Court Rule 14.1(g), petitioners have failed to set out the facts material to consideration of the Questions Presented. Petitioners have also violated Supreme Court Rule 14.4 by failing to present with accuracy, what is essential to a ready and adequate understanding of the points requiring consideration. Petitioners' Statement of the Case does not even include the predicate acts which formed the pattern of racketeering activity in this case.

Petitioners are seeking a review of issues involving the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*. It is inconceivable that petitioners can expect this Court to decide whether a "pattern of racketeering activity" existed when the petitioners do not even disclose the predicate acts themselves. On this basis, the petition for writ of certiorari should be denied.

General Nature Of The Case

The case before this Court involves illegal activity which occurred over a three-year period from 1987 to 1990. That illegal activity included a series of fraudulent

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[2] It must be noted that petitioners' Statement of the Case contains a number of incorrect and misleading statements.

schemes perpetrated by a Chicago-based exporting company known as Mutual Trading Corporation ("MTC"); its president, Mohammad Shafiq ("Shafiq"); and its chief financial officer, John Hauper ("Hauper")[3] (collectively referred to as "the MTC Defendants"). The victim, Uniroyal Goodrich, manufactured and sold automotive and truck tires. MTC purchased tires from Uniroyal Goodrich and exported the tires to various international markets, including Saudi Arabia. Opinion, Pet. at 2A.

Richard Germano ("Germano"), a former Uniroyal Goodrich employee, was another defendant at trial.[4] MTC, through Shafiq and Hauper, conspired with Germano to defraud Uniroyal Goodrich through a variety of different strategies. The MTC Defendants gave Germano secret payments and other incentives. In return, Germano abused his positions within Uniroyal Goodrich, enabling MTC to receive hundreds of thousand of dollars worth of wrongful reimbursements and credits. Germano also benefitted MTC by divulging confidential company information. Opinion, Pet. at 2A-5A.

Germano was eventually caught in 1990 by Uniroyal Goodrich's internal auditors. He confessed to having received secret payments in exchange for his being "lenient" when reviewing MTC's accounts. Germano received at least $20,000 from the MTC Defendants.[5] When

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[3] Hauper's name appears only in petitioners' initial prayer for relief and nowhere else in the petition.

[4] The petition also fails to reference Germano or his crucial involvement in the case.

[5] In early 1989, Hauper gave Germano airplane tickets to London, where Germano received $15,000. Germano hid the

(continued...)

confronted, Germano resigned from Uniroyal Goodrich after twenty years of employment. Opinion, Pet. at 4A, 6A.

The following is a summary of the various schemes.

The Detroiter Scheme

Uniroyal Goodrich allowed MTC to export "Detroiter" model tires into Saudi Arabia. Sometime in 1986, Palmer Industries, an unrelated party, managed to transport "AI" (appearance imperfect) Detroiter tires from Mexico to Saudi Arabia without Uniroyal Goodrich's knowledge or consent. Opinion, Pet. at 2A-3A.

MTC claimed that its Saudi customers were returning these AI tires because of alleged defects. MTC further stated that it paid these customers refunds. MTC then requested reimbursement from Uniroyal Goodrich. Before reimbursing MTC, Uniroyal Goodrich requested substantiation of the claims. Uniroyal Goodrich proposed that MTC submit a list of all the serial numbers of the tires for which MTC sought reimbursement. Opinion, Pet. at 2A-3A.

MTC submitted a list of serial numbers for 4,896 tires. These serial numbers matched Uniroyal Goodrich's record of tires manufactured in Mexico during the relevant time period. Based upon that list, Uniroyal Goodrich paid MTC in excess of $200,000. In fact, the serial

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[5] (...continued)
money in a secret account at the Bank of Credit and Commerce International in Gibraltar. Shafiq sent another $5,000 to Germano ten months later. Germano failed to report any of the payments to the IRS until almost three years later, when his deposition was taken in this case.

number list was a fabrication. MTC concocted the list using confidential information supplied by Germano. Opinion, Pet. at 3A.

The Cooperative Advertising Scheme

The MTC Defendants also defrauded Uniroyal Goodrich by exploiting Germano's position as administrator of Uniroyal Goodrich's Cooperative Advertising Program. Under this "Co-op" program, Uniroyal Goodrich would credit its customers for approved advertising costs within certain limitations and restrictions. Germano was responsible for the administration of the Co-op program in the International Division during 1988 and for a portion of 1989. Opinion, Pet. at 3A.

Beginning in 1988, MTC requested advertising credits for outdoor billboards allegedly erected in Nigeria. At various times Hauper and others at MTC used the mails to request these fraudulent Co-op reimbursements. Over a period of time, Germano approved all reimbursements to MTC at 100% rather than the required 50%. This and other favors resulted in benefits to MTC under the Co-op program of close to $300,000. A subsequent investigation by Uniroyal Goodrich revealed that the billboards were not in existence until after the fraud was discovered and Germano had confessed. Opinion, Pet. at 3A-4A, 8A-9A.

The Volume Bonus Scheme

Another incentive program administered by Germano for Uniroyal Goodrich was known as "the volume bonus plan." Uniroyal Goodrich's volume bonus plan rewarded customers for a large volume of purchases. Under the program, tires shipped and paid for in a particular year

were used to calculate various rewards. Opinion, Pet. at 4A.

In December of 1987, Germano included in MTC's account an order for 50,000 tires which had not yet been manufactured, let alone purchased or delivered. Germano then failed to deduct the order from the 1988 purchases. Instead, he added another 80,000 non-existent tires to MTC's account. "The result of Germano's shenanigans was an unearned credit to MTC's account exceeding $230,000." Opinion, Pet. at 4A.

The Reno Scheme

In late 1989, Uniroyal Goodrich sold MTC a discontinued model of tire known as the "Reno." Hauper sent Germano a letter falsely claiming that the Reno tires shipped to MTC were either scrap or a much less expensive "ADV" model tire. Germano arranged for the Reno tires to be billed to MTC as if they were, in fact, ADV tires. Moreover, Germano disobeyed a Uniroyal Goodrich superior and allowed MTC's Reno letter of credit to expire. Germano's actions and omissions involving the Reno tires cost Uniroyal Goodrich an additional $144,000. Opinion, Pet. at 4A-5A, 7A-8A.

Pricing Concessions

MTC arranged for Germano to take a clandestine trip to its Chicago headquarters in December of 1988. Upon his return to Uniroyal Goodrich, Germano arranged for the forgiveness of more than $38,000 in interest on MTC's account. He also abused his position as pricing administrator and substantially underpriced tires sold to MTC. This under-billing benefitted MTC more than $150,000. Opinion, Pet. at 5A, 8A.

Fraudulent Financial Statements

MTC also made use of two sets of accounting records to defraud and mislead Uniroyal Goodrich's credit department. One set of books, discovered during litigation, showed MTC was in deep financial trouble. However, MTC created a second set of books which portrayed a financially healthy company. MTC used the fraudulent set of books to obtain credit from at least two banks. MTC also sent the false set of books to Dun & Bradstreet in order to obtain a favorable credit rating. Most importantly, MTC submitted this second set of books to Uniroyal Goodrich's credit department. This misinformation caused Uniroyal Goodrich to expand MTC's line of credit, eventually resulting in a loss of $1.1 million in tires sold to MTC.

Litigation History

Petitioners present an incomplete and misleading history of the litigation. In April of 1990, Uniroyal Goodrich filed a twelve-count complaint against MTC seeking recovery under various theories, including RICO, the Illinois Consumer Fraud Act, common law fraud, tortious interference with contract relations, and open account claims.[6] The open account claims were based on MTC's failure to pay for more than $1.1 million worth of tires sold to MTC.[7] Opinion, Pet. at 5A.

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[6] Petitioners neglect to mention that the trial court had jurisdiction to hear and determine this controversy pursuant to 18 U.S.C. § 1964; 28 U.S.C. § 1331; and the court's supplemental jurisdiction as to the state law claims, 28 U.S.C. § 1367.

[7] Contrary to the allegation in footnote 6 of the petition, Uniroyal Goodrich did not claim the open accounts were predicate acts under RICO.

MTC later filed a five-count counterclaim. The trial court granted summary judgment in Uniroyal Goodrich's favor on certain of MTC's counterclaims. MTC withdrew several other counterclaims during the course of the trial. Eventually the trial court entered judgment as a matter of law in Uniroyal Goodrich's favor on the remaining counterclaims at the close of all the evidence. Opinion, Pet. at 5A.

The pre-trial litigation consisted of four years of heavily disputed discovery and motion practice. The trial itself lasted the entire month of May 1994. Almost thirty witnesses were called and more than 1,300 exhibits were entered into evidence. Opinion, Pet. at 16A

Prior to the jury's verdict, the trial court awarded Uniroyal Goodrich nearly $1.8 million on its open account claims. The jury then returned a verdict in favor of Uniroyal Goodrich on each and every count. The jury awarded Uniroyal Goodrich $220,000 on the remainder of its open account claims and $156,000 under the RICO and other fraud claims. The jury also awarded punitive damages in the following amounts: $20,000 against Germano, $250,000 against Shafiq, $50,000 against Hauper and $0 against MTC. After trebling of the RICO damages and after including all other damages, Uniroyal Goodrich was awarded approximately $2.8 million. The trial court later awarded approximately $1.4 million in attorneys' fees and $45,000 in costs. Opinion, Pet. at 5A, 1B-2B, 1C-4C.

The judgment as a matter of law, the verdict and the award of attorneys' fees and costs were all affirmed by the Seventh Circuit. The decision was unanimous. The MTC Defendants then sought a rehearing with a suggestion for rehearing *en banc*. The petition for rehearing

was denied. All of the judges on the original panel voted to deny, and none of the other judges in active service requested a vote thereon. Opinion, Pet. at 19A, 20A.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Ruling Below That The Existence Of At Least Four Separate Schemes, All Of Which Were Designed To Swindle Money From The Victim Over A Three-Year Period, Can Constitute A "Pattern Of Racketeering Activity" Was Consistent With The Holdings Of *Sedima* And *H.J. Inc.*

Conspicuous by its absence is any discussion by petitioners of any reason why certiorari should be granted. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) (discussing the purposes and use of certiorari jurisdiction). Petitioners have not argued that the Seventh Circuit law regarding RICO is in conflict with any other circuit. Petitioners have not made this argument because the Seventh Circuit is not in conflict with any other circuit. Petitioners have not argued that the Seventh Circuit in this case applied the wrong standard of law. Indeed, the Seventh Circuit appropriately applied the tests set forth by this Court. Petitioners have not argued that this case presents any issues of special importance or any issues of consequence that would affect any other case. Petitioners cannot make this argument because the determination of a pattern of racketeering is particularly fact specific and must be addressed on a case-by-case basis.

What petitioners do complain about is the sufficiency of the evidence presented at trial proving a pattern of racketeering. Petitioners contend that "UGTC's pleadings

failed to allege and its evidence failed to establish that MTC was either an association existing for long-term criminal purposes or that it committed criminal acts as a regular way of conducting its legitimate business." Pet. at 8.

This argument, however, is premised on a gross mischaracterization of the record: claiming that the parties were in a successful legitimate business relationship gone sour. The facts established at trial prove an entirely different proposition. As the Seventh Circuit emphatically stated:

> [A]n ever-increasing number of authorities including the jury, the trial court, and now this court, believe that Uniroyal presented a very persuasive RICO case.

Opinion, Pet. at 16A.

Although petitioners state in their heading that the decision of the Seventh Circuit conflicts with this Court's holdings in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989) and *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), nowhere in the argument is this "conflict" discussed. Indeed, petitioners would be hard pressed to make such an argument since the correct standard of law was discussed and applied in this case.

This Court in *H. J. Inc.* discussed the requirements for establishing a pattern of racketeering activity under the RICO statute.

> Congress had a more natural and common-sense approach to RICO's pattern element . . . a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted

> to, or threatened the likelihood of, continued criminal activity.

492 U.S. at 237.

This pattern requirement is fulfilled where the predicate acts are related and amount to or pose a threat of continued criminal activity. *Id.* at 239. The relatedness component is present "if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240.

Continuity, as defined by this Court, can be established either "by proving a series of related predicates extending over a substantial period of time" or "by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *Id.* at 242. The determination of continuity and relatedness is a *fact specific inquiry* for the courts. *Id.* at 242, 243.

Unquestionably the Seventh Circuit applied the correct standard of law to the facts of this case. Petitioners have not argued otherwise. The Seventh Circuit applied the *Sedima* and *H.J. Inc.* test of relatedness and continuity to the facts of this case, noting that these elements are particularly a *factual determination*. After reviewing the law, the Seventh Circuit found that there was more than sufficient evidence adduced at trial that proved that MTC had indeed engaged in a pattern of racketeering.

The facts establish beyond the pale that the defendants engaged in a pattern of racketeering activity which substantially injured Uniroyal:

> [P]roven at trial were the existence of at least four separate schemes all of which were designed to

> swindle money from Uniroyal and all of which utilized the mails and wires to further their ends. . . . The various predicates of mail and wire fraud occurred repeatedly over a period as long as three years and each scheme, though inflicted upon the same victim, caused separate and distinct injuries like those caused in *Liquid Air*.[8]

Opinion, Pet. at 13A. The Seventh Circuit did not err when it affirmed the jury's verdict of a violation of the RICO statute on these facts. As the Seventh Circuit held:

> If this case is in any way distinguishable from *Liquid Air*, it is that it presents a stronger case for liability; the facts of this case put it squarely within RICO's ambit.

Opinion, Pet. at 13A.

Petitioners have failed to give this Court any valid reason why the petition for writ of certiorari should be granted. There is no split in the circuits, nor is there a conflict between this case and any decision of this Court. Petitioners have presented no matter of special importance, nor any other compelling reason to grant the petition on this issue.

B. The District Court's Award Of $1.4 Million In Attorneys' Fees To The Plaintiff Following A Combined Verdict Of $2.8 Million Was Reasonable And Was Not A Penalty.

Petitioners contend that the awarding of $1.4 million in attorneys' fees constitutes a "penalty" in light of the jury's $156,000 verdict on Uniroyal Goodrich's RICO

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[8] *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (CA7 1987), *cert. denied*, 492 U.S. 917 (1989).

claims. Petitioners have cited absolutely no authority to support their assertion that the fee award constitutes a "penalty." Petitioners have not even argued that the district court or the Seventh Circuit misapprehended the law.[9] Rather, petitioners simply disagree with the district court's and Seventh Circuit's findings that the plaintiff's attorneys expended a reasonable amount of time on this matter. In short, petitioners ask this Court to exercise its jurisdiction to set aside what petitioners consider to be erroneous factual findings and a misapplication of the law. Thus, the petition ignores the admonitions of Supreme Court Rule 10, which warns that certiorari is rarely granted "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

As this Court noted in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), a district court has discretion in determining the amount of a fee award "in view of [its] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.* at 437.

Moreover, petitioners have neglected to mention the material facts necessary for this Court to consider whether to accept this case for consideration. By any objective measure, Uniroyal Goodrich obtained a resounding victory. At trial, it obtained a judgment against the defendants totalling *more than $2.8 million*. The jury

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[9] Furthermore, by failing to argue before the trial court or the appellate court that the fees constitute a penalty, petitioners waived this argument. *Ellis v. Dixon*, 349 U.S. 458, 460 (1955).

returned a verdict in favor of Uniroyal Goodrich and against the defendants on each and every count.[10]

The district court found that "all of Uniroyal's claims were based upon related theories and on a common nucleus of facts generally revolving around the defendants' efforts to defraud Uniroyal." Memorandum Opinion at A2. Petitioners do not challenge this finding. Based on its review, the district court concluded that Uniroyal Goodrich was entitled to recover fees on all of the work done on the related claims. The district court's conclusion is entirely consistent with this Court's holding in *Hensley*:

> In [some] cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. . . . Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of *the overall relief obtained by the plaintiff* in relation to the hours reasonably expended on the litigation.

Hensley, 461 U.S. at 435 (emphasis added). Uniroyal Goodrich's recovery of $2.8 million in damages more than justifies the fees that it was awarded.

Nevertheless, petitioners challenge the district court's factual finding that the amount of time that Uniroyal Goodrich's counsel expended in conducting this litigation was reasonable. The district court, however, thoroughly addressed and disposed of each of petitioners' objections to Uniroyal Goodrich's fee petition. Memorandum Opin-

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[10] In addition to ignoring the total amount of the verdict, petitioners neglect to mention that the district court awarded attorneys' fees to Uniroyal not simply under RICO, but also pursuant to Shafiq's personal guaranty and the Illinois Consumer Fraud Act, 815 ILCS 505/10a. Opinion, Pet. at 15A.

ion at A2-A6. The district court oversaw most aspects of the four years of pre-trial litigation and presided over the four-week jury trial. Thus, it was in the best position to determine whether the amount of time expended was reasonable. *See Hensley*, 461 U.S. at 437.

The Seventh Circuit reviewed the district court's award in detail and had the opportunity to review the district court record. It unanimously held that the fees awarded were reasonable. In disposing of the defendants' objections to the fee award, the court specifically found: "The complexity of the case justified the efforts of the team of lawyers." Opinion, Pet. at 16A.

In short, petitioners' disagreement with the reasonableness of the plaintiff's fee award—an award that was scrutinized and affirmed on appeal—is not a sufficiently compelling reason to grant their petition.

C. The District Court's Trebling of Damages Pursuant To 18 U.S.C. § 1964(c) And The Jury's Award Of Punitive Damages On State Tort Claims Were Correct, And The Issue Was Not Properly Raised In The Petition.

In a last-ditch effort to gain this Court's attention, petitioners have attempted to make an issue out of whole cloth: namely, that the plaintiff must choose its damage award. However, petitioners failed to raise this issue in their appeal to the Seventh Circuit. Nowhere is this issue mentioned in any of the briefs filed by petitioners when they were before the Seventh Circuit. Thus, petitioners have waived this issue, and there is no reason for this Court to consider it. *Ellis*, 349 U.S. at 460.

Furthermore, petitioners have failed to point to a conflict among the circuits regarding this issue. Moreover,

petitioners do not claim that the decision of the lower court trebling the RICO damages is in conflict with any decision of this Court. Petitioners fail to provide this Court with any compelling reason to accept the petition for writ of certiorari on this point.

Trebling of the RICO award is mandatory under the statute. 18 U.S.C. § 1964(c). The award of punitive damages under state law claims is specifically authorized under Illinois law. *Gent v. Collinsville Volkswagen, Inc.*, 116 Ill. App. 3d 496, 451 N.E.2d 1385 (5th Dist. 1983). The jury instructions on this issue were clear and without objection in the trial court. Instead, the jury was given proper RICO and punitive damage instructions, which petitioners do not contest. Petitioners merely want this Court to lower the damage award. That is not a proper basis for certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNIROYAL GOODRICH TIRE COMPANY,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 90 C 2370
	)	
	)	
MUTUAL TRADING CORPORATION, MOHAMMED SHAFIQ, JOHN P. HAUPER, and RICHARD K. GERMANO,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

On May 27, 1994, after a four-week jury trial and four years of litigation, I entered judgment in Uniroyal Goodrich Tire Company's ("Uniroyal") favor. Judgment as a matter of law was entered for plaintiff on Counts VII and VIII. In addition, I entered judgment on the jury's verdict for claims under 18 U.S.C. § 1961, *et seq.* ("RICO"), under the Illinois Consumer Fraud and Deceptive Business Practices Act ("Illinois Consumer Fraud Act"), 815 ILCS 505, common law fraud, payment on account of goods sold and delivered, breach of fiduciary duty, intentional interference with contractual relations, and on the Mr. Shafiq's personal guarantee of Mutual Trading Corporation's obligations. Uniroyal seeks to recover its attorneys' fees and nontaxable expenses pursuant to Federal Rule of Civil Procedure 54(d)(2), 18 U.S.C. § 1964(c), 815 ILCS 505/10a(c), and under Mr. Shafiq's personal guaranty. Uniroyal also seeks to recover the costs of litigation tax-

able under Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920.

Attorneys' Fees

A plaintiff who prevails on a RICO claim is entitled to recover the cost of the lawsuit, including a reasonable attorneys' fee. 18 U.S.C. § 1964(c). In addition, a plaintiff who prevails under the Illinois Consumer Fraud Act is entitled to attorney's fees. 815 ILCS 505/10a(c). Generally, when a plaintiff is entitled to attorneys' fees by statute on one claim and prevails on other claims arising out of the same common nucleus of facts, the plaintiff is entitled to recover fees on all of the work done on the related claims. *See Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct. 1993, 76 L.Ed.2d 40 (1983); *Rosario v. Livaditis*, 963 F.2d 1013, 1021 (7th Cir. 1992) (citing *Hensley v. Eckerhart* as support for awarding attorneys' fees arising from the pursuit of two claims to plaintiff who was successful in its claim under the Illinois Consumer Fraud Act but unsuccessful on RICO claim even though the RICO claim absorbed most of the litigation effort but both claims were based on a common core of facts and related legal theories); *Bingham v. Zolt*, 823 F. Supp. 1126, 1137 n.9 (S.D.N.Y. 1993) (awarding attorneys' fees for entire litigation including non-RICO claims because they involved common nucleus of facts and were based on related legal theories). Here, all of Uniroyal's claims were based upon related legal theories and on a common nucleus of facts generally revolving around the defendants' efforts to defraud Uniroyal. The plaintiff won a jury verdict on every claim submitted to the jury and two counts as a matter of law. There can be no doubt that it is the prevailing party in this litigation. Therefore, it is entitled to an award of attorneys' fees as well as costs.

Defendants make several attacks on Uniroyal's fee petition. However, defendants do not assail the amount charged per hour by the various attorneys who worked on Uniroyal's behalf over the course of the litigation. After comparing the rates to those charged by other attorneys in the Chicago area of equivalent expertise and experience, I find that they are eminently reasonable.

Defendants contend that Uniroyal should not be able to receive attorneys' fees where there has been a duplication of effort and unnecessary time spent by Uniroyal's attorneys. Defendants cite to instances where more than one attorney for Uniroyal was present at court appearances, depositions and trial. With regard to court appearances, defendants cite to three occasions where two attorneys appeared for Uniroyal, two occasions when three appeared and one occasion where four appeared. I agree with the defendants that generally speaking only one attorney from a side need be present at a status hearing. Here, however, in litigation encompassing four years and 459 docket entries, the fact that on these few occasions it was necessary for more than one attorney to be present to apprise the court of the case's status is not particularly surprising or inappropriate.

With regard to multiple attorneys present to argue motions, this objection is overruled. In a complex cases such as this, it would be unreasonable to assume that one attorney would always be able to coordinate the required documentation and legal materials required to present a motion. In a similar vein, the presence of multiple attorneys at settlement, pretrial, and jury conferences is to be expected in this sort of a case. In a complex case, involving large sums of money it is only natural that the several attorneys responsible for differing aspects of the case be present at these critical junctures

to insure that the resolutions made at those conferences are adequately represent the client's litigation position.

Defendants' contention that having three attorneys and a legal assistant present at trial is a gross duplication of effort is also overruled. The trial in this case lasted 15 days. More often than not there was more than one witness per day with Uniroyal attorneys examining 26 witnesses in total. During the course of the trial, there were a number of motions argued by the attorneys. This case was highly document intensive with 1,372 exhibits admitted into evidence. Considering all of this, it was not at all unreasonable to have three attorneys and a legal assistant participating in the trial.

Defendants' assertion that the accumulation of 8,500 hours of attorney time is also without merit for many of the same reasons. This case was filed on April 24, 1990. The last docket entry is dated September 16, 1994, a span of over four years. Again, the trial lasted 15 days. Uniroyal's proposed exhibit list contained 1,082 documents and defendants' list contained 740. Discovery involved retrieving documents and other evidence from Africa and cities in the United States other than Chicago.

Defendants' objection to the amount of time spent on the pretrial order is not well taken for the reasons discussed above. Likewise, its objections to the amount of time spent reviewing the privileged document list, drafting and responding to interrogatories and drafting motions *in limine* are rejected. With respect to preparing for and taking Mr. Germano's deposition, Mr. Germano was a critical figure in the defendants' fraudulent scheme. He was deposed on four nonconsecutive days, all of which required the review of many documents. Thus, the 100 hours spent preparing for and taking his deposition was not excessive.

The fact that Uniroyal had three attorneys travel from Chicago to Akron to aid in the defense of five Uniroyal employees is not excessively duplicative in light of the facts. These depositions were taken on short notice and it was necessary to prepare for them in a short period of time. Thus, three of Uniroyal's attorneys went to prepare the witnesses. Defendants' objection to Janice E. Crossland's presence at each of the depositions is baseless. She was present as Uniroyal's corporate representative and, thus, her presence is irrelevant to the fee petition.

The fact that the attorney hours itemized on each monthly bill do not equal the amount totaled in the monthly summaries is not grounds for objection. The bills were redacted, thus removing amounts for which Uniroyal is not seeking fees. The monthly summaries reflect the amounts Uniroyal has actually been billed. Uniroyal is seeking reimbursement only for the amounts that appear in each itemized bill, a lesser amount. Also, Uniroyal is not seeking reimbursement for amounts it has paid for attorney meals. Those amounts do appear in the monthly bills but have not been included in the total.

Defendants' contention that Uniroyal has not adequately apportioned its expert witness fees between successful and unsuccessful claims is baseless. Uniroyal was successful on every count. The expert testimony was reasonably necessary for Uniroyal to prove its case. Therefore, Uniroyal is entitled to its expert witness fees.[1]

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[1] Defendants do not raise the issue of whether Uniroyal is entitled to expert witness fees under 18 U.S.C. § 1964(c). The statute states that the plaintiff is entitled to recover "the cost of the suit, including a reasonable attorney's fee." *Id.* Defendants have cited no authority indicating that expert witness

(continued...)

Uniroyal is entitled to $1,402,065.76 in attorneys' fees.[2]

Costs

When awarding costs, the court must determine that the costs sought are allowable and that they are reasonable, "both in amount and necessity to the litigation." *Weihaupt v. American Medical Ass'n*, 874 F.2d 419, 430 (7th Cir. 1989). However, "[t]he losing party has the burden to affirmatively show that the prevailing party is not entitled to costs." *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1409 (7th Cir. 1991). 28 U.S.C. § 1920 allows the court to assess costs where the deposition for:

(1) Fees of the clerk and marshall;

(2) Fees of the court reporter for all or part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

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[1] (...continued)
fees are not included as a cost of the suit, and I find that they are recoverable under the statute. *See Hertz Corp. v. Caulfield*, 796 F. Supp. 225, 230 (E.D. La. 1992); *Abell v. Potmac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988), *vacated on other grounds*, *Fryer v. Abell*, 492 U.S. 914 (1989) (relying on rule used in civil rights cases that expert fees are allowed as part of attorneys' fees); *Cf. Heiar v. Crawford County Wisconsin*, 746 F.2d 1190, 1203 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) (allowing expert witness fees under ADEA as part of attorneys' fees).

[2] This is the amount requested plus $4,147.52 in computerized legal research fees that are appropriate as attorneys' fees but were improperly requested in the Bill of Costs. *See* discussion below.

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A. Court Reporter Costs

Court reporter costs for depositions are recoverable under 28 U.S.C. § 1920(2). Uniroyal identified 46 witnesses that might potentially be called at trial. Defendants identified 29. The parties each designated ten depositions to be read at trial. In addition, there were a substantial number of former employees from in and out of state who may or may not have been available to testify at trial. These factors, combined with the long passage of time between the first depositions and trial, makes it clear that transcripts of these depositions were necessary.

Defendants' objection to charges for deposition transcripts for Mutual Trading Corporation's officers and agents alleging that they "were clearly for discovery and trial preparation" purposes is overruled. Def.'s Objections to Pl.'s Bill of Costs at 13. "[C]harges for deposition transcripts may be taxed as costs where the deposition appeared to be reasonably necessary in light of the particular situation at the time it was taken, even if the witness was not called at trial or the deposition used at trial, and even if the deposition was for discovery purposes only," *E.E.O.C. v. Sears Roebuck and Co.*, 114 F.R.D. 615, 622 (N.D. Ill. 1987) (citations omitted), provided that it is not merely necessary for the convenience of the attorney or purely investigative. *Hudson v. Nabisco Brands, Inc.*, 758 F.2d 1237, 1243 (7th Cir. 1985).

Here, defendants have admitted that these transcripts were used for trial preparation. Furthermore, defendants

have failed to identify specifically which transcripts were allegedly unnecessary, nor presented some explanation as to why they were unnecessary. *See Gustovich v. AT&T Communications, Inc.*, 1991 U.S. Dist. LEXIS 17887 (N.D. Ill. 1991) (broad assertions that depositions were unnecessary are insufficient to persuade the court to deny costs). I find that the transcripts were necessary for effective trial preparation and for preparing various motions.

Uniroyal is not entitled to recover the charge for ASCII diskettes of each transcript. This is merely for the attorney's convenience. Each diskette cost $45 and Uniroyal has included charges for 29 depositions. Therefore, the total costs allowable will be reduced by $1,305.00.

Defendants object to an award for expedited transcript costs during the trial. Because of the complexity of the issues, the length of the trial, the large size of Uniroyal's claim, and the number of witnesses, expedited transcripts were reasonably necessary. *See Independence Tube Corp. v. Copperweld Corp.*, 543 F. Supp. 706, 719 (N.D. Ill. 1982), *aff'd*, 691 F.2d 310 (1982) *rev'd on other grounds*, 467 U.S. 752 (1984); *E.E.O.C. v. Sears Roebuck & Co., supra*, 114 F.R.D. at 622. However, as with the depositions, ASCII diskettes merely make using the transcripts more convenient for the attorney and, therefore, Uniroyal is not entitled to an award of costs for those charges. ASCII diskette charges for the trial transcript total $1,654.25. Thus, the total allowable charge for deposition and trial transcripts is $29,168.99.[3]

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[3] The $32,128.24 requested minus $1,305 and $1,654.25 in ASCII diskette charges for depositions and trial, respectively.

B. Copying Costs

Defendants' contention that Uniroyal is not entitled to recover costs for copies of documents made during discovery is made without citation to authority or persuasive argument. Defendants benefited during discovery because Uniroyal did its own copying rather than have defendants do it. These charges are recoverable under Section 1920(4) and were reasonably priced at 15 cents per page.

Defendants' contention that there are duplicative charges related to documents used at trial is unfounded. Some of the copies were included in the trial binders given to the jury. Other documents were listed on the pretrial order and available in court. When the second documents were tendered to the jury, additional photocopying was required. Thus, the charges were not duplicative.

Due to the complexity of the issues, the demonstrative aids, which were often enlargements of exhibits already in the hands of the jury, were necessary. Having "blown up" charts allowed the witnesses and attorneys to guide the jurors' attention to the appropriate area of the exhibits and were clearly helpful to their understanding of the case.

C. Subpoena of Bank Documents

The costs required to subpoena bank documents were necessary for Uniroyal to prove its RICO and Illinois Consumer Fraud Act claims. The subpoenaed documents enabled Uniroyal to prove that Shafiq and Hauper engaged in a pattern of racketeering by submitting false financial statements and to prove that Uniroyal was injured by extending letters of credit to Mutual Trading Corporation in reliance on false information in the finan-

cial statements sent to the banks. Thus, these charges were necessary.

D. Computerized Legal Research Costs

Computerized legal research is a task generally performed by attorneys, paralegals and law clerks. It is a cost incident to attorneys' fees. *E.E.O.C. v. Sears Roebuck and Co.*, 111 F.R.D. 385, 394 (N.D. Ill. 1986). Because it is a tool to make more efficient use of an attorney's time, charges for it are really expenses associated with attorneys' fees. *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 1994 WL 569451 (7th Cir. Oct. 19, 1994). Consequently, while Uniroyal's request is not allowable as a cost, it is allowable as part of the attorneys' fees. Accordingly, the Bill of Costs must be reduced by $4,147.52 and the Petition for Attorneys' Fees increased by the same amount.

Uniroyal is entitled to $45,966.37 in costs.

Conclusion

For the reasons stated, Uniroyal is entitled to $1,402,065.76 in attorneys' fees and $45,966.37 in costs.

ENTER ORDER:

/s/ Elaine E. Bucklo
ELAINE E. BUCKLO
United States District Judge

Dated: October 31, 1994

APPENDIX B

ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT

815 ILCS 505/10a. Actions for damages

(a) Any person who suffers damage as a result of a violation of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual damages or any other relief which the court deems proper. Proof of a public injury, a pattern, or an effect on consumers generally shall not be required. . . .

(c) Except as provided in subsection (f) of this Section, in any action brought by a person under this Section, the Court may grant injunctive relief where appropriate and may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs to the prevailing party. . . .

Supreme Court, U.S.
FILED
JAN 10 1996
CLERK

No. 95-900

In The

Supreme Court of the United States

October Term, 1995

MUTUAL TRADING CORPORATION, MOHAMMED SHAFIQ, and JOHN HAUPER,

Petitioners,

v.

UNIROYAL GOODRICH TIRE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioners Mutual Trading Corporation, Mohammed Shafiq and John Hauper, herewith reply to the respondent's Brief in Opposition and urge this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

I.

Additional Statement of the Case

The respondent faults the petitioners for failing to discuss in detail UGTC's allegations and evidence regarding its many RICO claims (Br. p. 2). The petitioners intentionally omitted such a discussion because the verdict makes clear that the jury gave UGTC's RICO claims little consideration. The jury verdict as well as the respondent's brief in opposition makes this point obvious.

UGTC claimed at trial (and does so again in its Brief in Opposition) that the petitioners engaged in *six* schemes to defraud (predicate acts) which caused the following RICO damages:

A.	"The Detroiter Scheme" (Br. 5)	$ 200,000.00
B.	"The Cooperative Advertising Scheme" (Br. 6)	$ 300,000.00
C.	"The Volume Bonus Scheme" (Br. 6)	$ 230,000.00
D.	"The Reno Scheme" (Br. 7)	$ 144,000.00
E.	"Pricing Concessions" (Br. 7)	$ 150,000.00

F.	"Fraudulent Financial Statements" (Br. 8)	$1,100,000.00
	Total	$2,124,000.00

In addition to the $2 million damages UGTC sought for the above RICO "frauds," it also sought damages for a variety of alleged state torts. Notably, the jury awarded UGTC a *total* of $156,000 in compensatory damages on its *combined* RICO and state tort claims. It is beyond reasonable debate that the jury utterly rejected UGTC's theory of multiple schemes.

The respondent implies that UGTC was the recipient of a $2.8 million RICO judgment (Br. 9, 13-15). That is not so. Mutual Trading Corporation owed UGTC $1.8 million on open accounts. That claim was uncontested.[1] Consequently, more than $2 million of the judgment was based on non-tort, non-RICO, non-fraud, breach of contract claims. The balance of the judgment was the $156,000 RICO/tort combined award plus punitive and trebled damages (i.e., the "quintupled damages").

REASONS WHY THE WRIT SHOULD BE GRANTED

A. There Is No Pattern Of Racketeering Activity

The petitioners correctly focused on the verdict actually returned, rather than respondent's RICO allegations, when assessing whether UGTC proved a pattern of racketeering activity. The respondent claimed well over $2

[1] The $220,000 Reno tire claim was the *only* open account claim contested at trial.

million in RICO damages based upon six alleged schemes to defraud.[2] The purported multiplicity of schemes was essential because under *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1986) and *H.J. Inc. v. Northwestern Bell*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195, 208 (1988), UGTC was obliged to prove that the petitioners engaged in *continuing* criminal activity. Without such evidence, UGTC's RICO claims must fail.

It is evident that the jury rejected UGTC's claims of multiple predicate acts. Had it found petitioners guilty of such frauds, the damages awarded would have been commensurate with the damages suffered by UGTC.[3] Although the jury checked the boxes on the verdict form finding in favor of UGTC on its 18 U.S.C. 1962 claims (App. C), its modest damage award belies the conclusion that it found the petitioners guilty of multiple schemes to defraud. Consequently, UGTC's argument (Br. 10-13) that it established a "pattern of racketeering activity" is without any basis in fact.

UGTC *alleged* multiple schemes and recovered damages. However, the damage award undermines UGTC's theory that the jury found the petitioners guilty of a multiplicity of schemes to defraud. Consequently, the District Court and the Seventh Circuit Court of Appeals clearly misapplied the *Sedima* and *H.J., Inc.* "pattern of racketeering" test to the facts in this case.

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[2] Although the petitioners denied liability, they did not dispute the amount of damages if liability was found against them.

[3] There is nothing in the record to suggest that the jury verdict was a "compromise" between damages and liability.

B. The $1.4 Million Fee Award Was Erroneous As A Matter Of Law

UGTC spent $1.4 million dollars in attorneys' fees and costs to recover $156,000 in compensatory damages on its combined RICO and state tort claims and $220,000 on the Reno tire open account claim. Title 18 U.S.C. § 1964 permits an award of costs and *reasonable* attorneys' fees. The Seventh Circuit essentially held that so long as there is a recovery, however modest, any amount of time actually spent in securing that recovery is compensable. The petitioners assert that the fees in this case constitute a penalty not contemplated by the RICO Act. They further assert that the award is contrary to this Court's holding of *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The fees awarded are not reasonably related to the result obtained and constitute a penalty not authorized by the RICO Act.

C. The Award Of Both Treble And Punitive Damages For The Same Conduct Is Not Proper

UGTC erroneously states (Br. 16) that the petitioners did not raise this argument in their appeal to the Seventh Circuit. The petitioners argued on page 36 of their opening brief before the Seventh Circuit,

> In addition to RICO damages, which the trial court trebled, the jury also awarded punitive damages against the defendants (R430). The net result of this is that the plaintiff was awarded quadruple damages for its alleged injuries. In that RICO damages are intended to be punitive in character, punitive damages are not available,

In re VMS Securities Litigation, 752 F.Supp. 1373, 1404 (N.D. Ill. 1990).[4]

UGTC's assertions that the trebling of a RICO award is mandatory under 18 U.S.C. § 1964(c) and that Illinois law permits punitive damages for fraud actions do not support the proposition that *both* are justified in any circumstance. In that RICO's trebled damages are intended to punish the defendants, punitive damage are duplicative and are unwarranted.

CONCLUSION

For the foregoing reasons, the petitioners urge this Court to grant the writ.

Respectfully submitted,

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[4] While the petitioners characterized the judgment as "quadruple damages" in the Seventh Circuit, it actually approximates a quintupling of the compensatory damage award.